Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

No. 92-960

In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

ANDREW L. FREY
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

TABLE OF AUTHORITIES

Cases: Page

Carpenter v. *United States*, 484 U.S. 19 (1987) 7

Chappell v. *United States*, 270 F.2d 274 (9th Cir. 1959), cert. denied, 485 U.S. 991 (1988) 6

Dowling v. *United States*, 473 U.S. 207 (1985) 5

United States v. *Fowler*, 932 F.2d 306 (4th Cir. 1991) 6

United States v. *Friedman*, 445 F.2d 1076, cert. denied, 404 U.S. 958 (1971) 6

United States v. *Girard*, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979) 8, 9

United States v. *Jeter*, 775 F.2d 670 (6th Cir. 1985) cert. denied, 475 U.S. 1142 (1986) 6, 9

United States v. *Lambert*, 446 F. Supp. 890 (D. Conn. 1978) 8

United States v. R.L.C., 112 S.Ct. 1329 (1992) 3

TABLE OF AUTHORITIES - Continued

Page

United States v. *Schwartz*, 785 F.2d 673 (9th Cir.), cert. denied, 479 U.S. 890 (1986) 6

United States v. Tobias, 836 F.2d 449 (9th Cir. 1988), cert. denied, 485 U.S. 991 (1989) 6

Statutes and regulations:

18 U.S.C. § 371 7

18 U.S.C. § 641 . . . . . 5, 6, 7, 9

18 U.S.C. § 1343 7

48 C.F.R. (1987)
§ 15.1001(a), (b) 3
§ 15.609(c) 3
§ 5.401(b)(1) 4
§ 15.413-1(b) 4

Miscellaneous:

Gallegos Research Group Corp., 89-3 B.C.A. (CCH) ¶ 21,901 at 110,240-41 (1989) 3

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-960

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR THE PETITIONERS

This case presents an issue of substantial importance – whether criminal liability may be imposed on private citizens for theft of government property or taking property by fraud when they obtain disclosure of government information, even though such disclosure is not prohibited by statute or published regulation, but only by internal government directives, custom or practice. Although it attempts to obscure the point by the inclusion of much irrelevant material in its somewhat distorted statement of the case, in the end the government cannot and does not deny that this case was charged, tried, submitted, and upheld on appeal on the theory that a criminal prosecution for theft of government information requires no statute or regulation prohibiting disclosure of the information in question. Instead, the government suggests that the issue, although squarely presented, does not warrant review in this case. The government's opposition is unconvincing.

1. We begin by setting the record straight regarding the applicability of Federal Acquisition Regulations (FARs) to the information obtained by petitioners. In its "Statement" (*e.g.*, Opp. 4-7 & nn.1-5), the government incorrectly implies that disclosure of the information was plainly covered by DoD regulations. We cannot leave unanswered this attempt to obscure the fact that the issue raised in the petition is indeed cleanly presented in this case.

First, it must be recognized that it is *the government* that has steadfastly opposed any requirement that it show that petitioners' conduct violated some published, publicly available regulation (or statute). Throughout the trial, petitioners vigorously sought to have their receipt of information measured against the rules set out in the FARs, while the prosecution maintained with equal vehemence that government custom, practice, or internal directives constituted sufficient bases for liability. See Pet. 5-9. Indeed, if as the government now insinuates, disclosure of the pertinent information was clearly prohibited by published regulations, its adamance at trial on this central point is incomprehensible. Having fervently opposed any attempt to limit the theory of the prosecution to standards in published regulations, the government should not now be permitted to duck the issue by suggesting that regulations in fact prohibited the disclosures.

Second, contrary to the implication that its Statement looks to the duly promulgated FARs for the framework governing procurement information (see Opp. 2-7), the Opposition in fact relies extensively on *internal* administrative directives that are not part of the FARs at all. See, *e.g.*, Opp. 4 n.1, 7 n.5; see also Opp. 18. Although the government ultimately concedes that these directives were "unpublished" (Opp. 18), it claims that they were "available to the public" (*id.* at 18 n.16) – apparently on the ground that, as the government stated below, the directives "would have been available through the Freedom of Information Act." Gov't

C.A. Br. 17 n.11. The principle that criminal statutes put citizens on notice "descends to needless farce when the public is charged even with knowledge of [congressional] Committee Reports," *United States* v. *R.L.C.*, 112 S. Ct. 1329, 1340 (1992) (Scalia, J., concurring in part); the implication that citizens may be charged with knowledge of purely internal government directives because they would be discoverable under FOIA is similarly untenable and should not be permitted to divert attention from the central issue in the case.[1]

Third, the government ultimately concedes – as it must – that disclosure of some of the most important information at issue (such as the FOCS acquisition plan and the ATACC evaluation weights) was *not* covered by any applicable FAR or statute. See Opp. 18; see also Pet. 21 n.25.

Fourth, even with respect to the FARs that it does cite, the government's presentation is incorrect and misleading. For example, it implies that petitioners' receipt of information that Litton's proposal had been deemed unacceptable violated the FARs. See Opp. 5 n.3. The government fails to mention that, under the FARs, a bidder was affirmatively *entitled* to know that its proposal had been deemed unacceptable *as soon as* the government had made that decision. See 48 C.F.R. §§ 15.1001(a), (b), 15.609(c) (1987); see also *Gallegos Research Group Corp.*, 89-3 B.C.A. (CCH) ¶ 21,907, at 110,240-41 (1989).[2] Indeed, the government fails even to acknowledge

---

[1] It also must be emphasized that a great deal of the government's case rested not on internal (but at least written) government directives, but simply on "custom and practice" of non-disclosure. See Pet. 6-9.

[2] The government acknowledged below that, pursuant to the FARs, "contracting officers should *ordinarily* promptly notify offerors whose proposals have been found to be unacceptable." (continued...)

that the district court granted a downward departure under the Sentencing Guidelines because it found that petitioners' conduct was "committed under an unclear regulatory regime." See C.A. App. 63, 65. (The government has not challenged the district court's finding or its sentencing departure).

The fundamental point, however, is that the government adamantly and successfully refused petitioners' repeated efforts to have this case turn on whether disclosure of the information at issue was or was not prohibited by the FARs (or any other publicly available regulations or statute). Having staunchly defended its decision to base this case on a theory that internal directives or custom and practice could be a basis for criminal liability, the government should not now be heard to change its tune.[3]

2. An essential cornerstone of the government's legal theory is the proposition that government information is

---

[2] (...continued)
Gov't C.A. Br. 40 (emphasis added). Similar flaws infect the government's discussion of other FARs. See Pets. C.A. Br. 36-40; Pets. C.A. Reply Br. 15-18. Among other errors and omissions, the government ignores the fact that the FARs made procurement information presumptively releasable, at the discretion of the contracting officer. See *e.g.*, 48 C.F.R. §§ 5.401(b)(1), 15.413-1(b) (1987); see also Pets. C.A. Br. 32-36.

[3] It bears emphasis that, if certiorari is granted, this Court will not be required to resolve any disputes about the meaning or reach of the FARs. As the case comes to the Court, the convictions rest on the principle that no statute or regulation prohibiting disclosure of information is necessary for theft of government property and wire fraud; it is solely the correctness of that proposition that the Court would be required to resolve. If the Court were to agree with petitioners, the meaning and applicability of the FARs could be addressed in subsequent proceedings in the lower courts.

government property under the pertinent statutes. As we explained in the petition (at 12-17), this threshold issue is of unquestionable importance. The differences between tangible government property and government information are readily apparent. Imposition of criminal liability for receipt of government information, moreover, raises an issue at the core of the citizen's relationship to the government.

a. With respect to Section 641, the proposition that receipt of government information is "conversion" of a "thing of value" is unconvincing. There can be no serious contention that the Congress that enacted Section 641 contemplated its application to government information (see Pet. 14 n.15) – and the Opposition does not suggest otherwise. It does argue that the statutory language unambiguously broadens the original congressional purpose (Opp. 13), but it is far from clear that the government may so readily escape the rule of lenity. See Pet. 14. Nor is the government's wholesale rejection (Opp. 13 n.10) of the relevance of *Dowling* v. *United States* sustainable. All of the factors relied upon in *Dowling* – the statute's language and history, the statute's focus on physical goods, the relation between the statute and legislation in other information contexts, and the broad reach of the government's theory (473 U.S. at 214-227) – are pertinent here. The government also ignores the historic meaning of "conversion," which applied only to tangible property and which counsels strongly against the government's interpretation. See Pet. 14 & n.16. Finally, contrary to the government's assertion (Opp. 13-14 n.11), adoption of its theory raises significant constitutional questions, as numerous jurists and commentators have recognized (Pet. 11, 15 & n.18, 25 n.34, 29).

In addition, the government is on exceedingly weak ground in suggesting that there is no uncertainty or conflict in the lower courts. The Ninth Circuit and other circuits have explicitly disagreed about whether Section 641 applies to

intangibles, such as information.[4] The government offers three insubstantial reasons for dismissing this obvious disagreement. First, it claims that a footnote in *United States* v. *Schwartz*, 785 F.2d at 681 n.4, casts doubt on the Ninth Circuit's rule. Soon after *Schwartz*, however, the Ninth Circuit explicitly and unambiguously clarified that *Chappell* remains good law and that *Schwartz* concerned an entirely different statute with an entirely different legislative history. *Tobias*, 836 F.2d at 451. (Indeed, Judge Anderson, the author of *Schwartz*, was a member of the unanimous panel in *Tobias*.) Second, the government is not aided by *United States* v. *Friedman*, 445 F.2d 1076 (9th Cir.) (see Opp. 16 n.13): the defendant in that case did not "argue that, as a matter of law, the information contained in the transcripts was not government property." *Id.* at 1087. Third, the attempt (Opp. 15) to limit *Chappell* to the intangible of government services is unavailing: the government offers no principled basis for such a limitation, and the Ninth Circuit has not read the case in such a stinted fashion. See *Tobias*, 836 F.2d at 451.

b. The attempt to minimize the significance of the issue with respect to the fraud statutes is similarly unconvincing. Here, too, no claim can be or is made that the enacting

---

[4] See *United States* v. *Tobias*, 836 F.2d at 451 ("We note that two circuits have reached conclusions contrary to ours on this point. * * * However, we are not persuaded that we should reconsider *Chappell*"); *United States* v. *Fowler*, 932 F.2d at 309-310 (4th Cir.) (The Ninth Circuit has held that "§ 641 did not apply to intangible property, including classified government information. * * * We agree with the Second and Sixth Circuits that conversion and conveyance of governmental information can violate § 641."); *United States* v. *Jeter*, 775 F.2d at 680 (6th Cir.) (following Circuit precedent in holding that Section 641 applies to an intangible such as information and recognizing that *Chappell* is "*contra*").

Congress contemplated application of the statutes to government information. The government seeks to wrap itself in the mantle of *Carpenter* v. *United States*, 484 U.S. 19 (1987), but, because of the obvious distinction between government and private information, it is driven to fashion a novel "market participant" doctrine for the mail and wire fraud statutes (Opp. 12 n.9) – an innovation that would plainly warrant this Court's careful consideration. Although the government attempts to distinguish decisions adopting a narrow view of "property" in the mail fraud statute with respect to the government's intangible information rights on the ground that they do not involve procurement information (Opp. 16-17 n.15), these divergent decisions regarding the government's intangible "property" rights strongly support review. See Pet. 17 n.19.[5]

3. As with the question whether the pertinent statutes apply to information at all, the issue whether liability may be imposed in the absence of a statute or published regulation prohibiting disclosure is an exceptionally important one on which uncertainty prevails in the lower courts.

As explained in the petition (at 18-24), a requirement that the government manifest a property right in exclusive use of government information through statute or regulation is

---

[5] The implication (Opp. 12 n.9) that petitioners have not preserved the claim that government information is not property under the wire fraud statute is untenable. Petitioners argued below that government information is not government property under Section 641 and that the principles that prevent liability for theft of government property also prevent liability for wire fraud. See Pets. C.A. Br. 28 n.10, 30-31 and C.A. Reply Br. 3 (issue is when "should a person who seeks out facts known to the government be deemed to have taken a 'thing of value' of the government 'without authority' (§ 641) or to have 'defrauded' the government of its intangible property (§§ 371, 1343)").

needed to give concrete, ascertainable meaning to the pertinent statutory terms. According to the government (Opp. 19-20), receipt of government information is criminal so long as the recipient knows that its disclosure is "not authorized," even though the context and meaning of that term are nowhere explained or defined. Indeed, the government says *nothing* to contradict our submission that, under its theory, virtually any unauthorized leak or whistleblower's complaint may subject a non-government recipient to criminal liability, so long as the recipient knows that the disclosure was not "authorized". To the contrary, it pronounces that criminal liability is appropriate if private individuals know that government officials do not wish disclosure of the information that the individuals seek. Opp. 19-20. But contrary to the government's implication, knowledge that government officials do not *approve* of disclosure of information is not equivalent to knowledge that the government has properly established its exclusive dominion over the information.

Moreover, the government's attempt to claim that there is no division on this issue in the lower courts is wholly unconvincing. The Second Circuit has unambiguously stated that the government's "own rules and regulations forbidding * * * disclosure may be considered as both *a delimitation and a clarification* of the conduct proscribed by the statute." *United States* v. *Girard*, 601 F.2d at 71 (emphasis added). Contrary to the government's suggestion (Opp. 21), *Girard*, unlike this case, did *not* present a situation in which release of some of the information had been prohibited solely by unpublished regulations. Rather, release of the information at issue in *Girard* was prohibited *both* by published regulations and unpublished regulations. See *United States* v. *Lambert*,

446 F. Supp. 890, 900 (D. Conn. 1978), aff'd, *Girard*, *supra*.[6]

4. Finally, the government suggests that the case is not of continuing importance for two reasons: (1) Congress has subsequently enacted the Procurement Integrity Act; and (2) the government proceeded in this case, not against reporters, but against businessmen. Neither objection is substantial.

a. The importance of the question of the application of the general theft and fraud statutes to government information is hardly confined to the procurement context (see Pet. 25, 29-30), as the outpouring of amicus interest in this petition confirms, so that the passage of the Procurement Integrity Act does not begin to diminish the general significance of this case.

In addition, the subsequent enactment of a statute specifically regulating disclosure of procurement information dramatically highlights the severe unfairness of this prosecution. The history and passage of the statute make unmistakably clear that Congress acted because, in its view, dissemination of government procurement information was *not* proscribed by existing criminal statutes. Pet. 26-28. The government's cavalier dismissal (Opp. 23 n.22) of this congressional belief misses the point. The widely held view of Members of Congress, after careful study, that there were *no* formal restrictions prohibiting dissemination of procurement information vividly illustrates the hazards and arbitrariness of permitting information theft prosecutions without requiring that a statute or regulation prohibit dissemination of the information. (Indeed, high-ranking government officers emphasized the

---

[6] Also contrary to the government (Opp. 22), *Jeter* specifically relies on the *Girard* principle that government regulations "'may be considered as both a delineation and a clarification of the conduct proscribed by [§ 641].'" 775 F.2d at 682.

importance of informal information-gathering by procurement bidders. See Pet. 26-27.)

b. The government also asserts (Opp. 24 n.23) that this case is not significant because the prosecution was not brought against journalists, and that it can be trusted to use discretion in selecting targets for information-theft prosecutions. But when the First Amendment is implicated, executive enforcement discretion is ordinarily a vice, not a virtue. In any event, the government's assertion fails to provide a reasoned basis for distinguishing in this context between journalists and the rest of the public. As the amicus briefs reveal, the ruling of the court of appeals in this case has engendered deep concern among a wide range of interested parties. These groups recognize that the ramifications of the case are far-reaching, and could be used to impose criminal liability on anyone who receives government information deemed "unauthorized" for release even though no rule adopted through the public law-making process prohibits dissemination of the information.

The issue presented is of surpassing importance and has been the subject of widely varying treatment in the lower courts. The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

MARCH 1993